BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB et al., Petitioners, vs. UTAH DIVISION OF OIL, GAS AND MINING, Respondents, and ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent-Intervenors.	**ORDER RE: (1) STANDARD GOVERNING OBJECTIVE COMPONENT OF ATTORNEYS' FEES LIABILITY INQUIRY; AND (2) WHETHER A PERMITEE MAY RECOVER FEES IF LESS THAN ALL CLAIMS WERE BROUGHT IN BAD FAITH WITH INTENT TO HARASS OR EMBARRASS** Docket No. 2009-019 Cause No. C/025/0005

This matter comes before the Board following the parties' request to brief the following two issues in response to the Board's November 3, 2014 Supplemental Order: (1) what standard governs the objective component of the bad faith analysis, under Rule B-15, in connection with a permittee's petition for attorneys' fees; and (2) how the Board should proceed if the objective element can be shown for some, but not all, of the underlying claims. This briefing was carried out pursuant to the parties' Stipulation Regarding Scope of Briefing and Briefing Schedule in Response to Supplemental Order – Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs, filed on December 24, 2014 (the "Stipulation").

The Board has reviewed the following briefs in connection with the present ruling:

- Alton Coal Development, LLC's Memorandum of Points and Authorities in Response to the Board's Supplemental Order, filed January 12, 2015;
- Utah Division of Oil, Gas and Mining's Memorandum of Law re: Request for

Additional Briefing on Attorney Fees Shifting, filed January 12, 2015 ("Division's Brief");

- Brief of Utah Chapter of Sierra Club, et al., On: (1) the Meaning of Rule B-15's Objective Bad Faith Element; and (2) Application of Rule B-15 If the Board Finds That Petitioners Had At Least Some Objective Good-Faith Basis for Challenging the Permit, filed January 12, 2015;

- Alton Coal Development, LLC's Reply Memorandum of Points and Authorities in Response to the Board's Supplemental Order, filed January 23, 2015;

- Utah Division of Oil, Gas and Mining's Reply re: Request for Additional Briefing on Attorney Fees Shifting, filed January 23, 2015;

- Reply Brief of Utah Chapter of the Sierra Club, et al., On (1) the Meaning of Rule B-15's Objective Bad Faith Element; and (2) Application of Rule B-15 If the Board Finds That Petitioners Had at Least Some Objective Good-Faith Basis for Challenging the Permit, January 23, 2015

- Utah Division of Oil, Gas and Mining's Motion and Order to Submit Supplemental Authority.

Having reviewed the above-referenced briefs, the Board resolves the questions identified in the Stipulation as follows:

I. The objective component of the bad faith standard set forth in Rule B-15 requires a showing that the subject claims were frivolous.

For the reasons discussed in the briefs of the Division and the Sierra Club directed to this issue, the Board concludes that the objective component of Rule B-15's "bad faith for the purpose of harassing or embarrassing" standard governing attorneys' fees petitions by permittees requires a showing that the subject claims were frivolous. *See* Division's Brief at 8-11. In recognizing this standard as part of the Rule B-15 test, the Board uses the term "frivolous" to

mean lacking an arguable basis in law or in fact. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Migliore v. Livingston*, 2015 UT 9, ¶31; *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶ 22, 20 P.3d 868. In order to meet this objective standard, Alton must therefore demonstrate not merely that the Sierra Club's claims failed to persuade the Board during the merits phase, but that those claims lacked an arguable basis.

The parties have requested the opportunity to file additional briefs following the Board's issuance of the present decision regarding the governing standard.[1] The Board agrees that such briefing would be helpful. These briefs should address application of the frivolousness standard to the Sierra Club's underlying claims. The Board directs Alton to file a brief which identifies which of the Sierra Club's underlying claims Alton contends were frivolous. This brief shall address each such claim individually and set forth all arguments in support of Alton's contentions regarding frivolousness. The Board does not anticipate any further briefing opportunity (and may elect not to hear oral argument) on whether Sierra Club's claims were or were not frivolous. Alton's brief is due on May 1, 2015. The Division and the Sierra Club may file responsive briefs on May 29, 2015 addressing how the frivolousness standard is to be applied to each of the claims identified in Alton's brief. Alton shall file a reply brief by June 19, 2015.

II. The frivolousness analysis will be applied to each individual claim, rather than to the action as a whole.

As to how the Board should proceed if Alton can demonstrate that some, but not all, of the underlying merits claims were frivolous, the Board concludes that *Fox v. Vice*, 131 S. Ct. 2205 (2011) is persuasive and should be followed. In *Fox*, the Supreme Court analyzed the

[1] The Division has suggested that Alton be required to file a new fees petition at this juncture, identifying which of the Sierra Club's claims it contends meet the frivolousness standard. The initial brief the Board has directed Alton to file requires Alton to make this identification and to make its arguments in support of its frivolousness contentions. In the interest of efficiency, the Board prefers to commence this briefing on the merits now.

attorneys' fees scheme in federal civil rights actions under 42 U.S.C. § 1988. As with the Coal Act provisions at issue here, under Section 1988, a defendant may receive a fee award if the plaintiff's claims were frivolous. *Id.* at 2211. The *Fox* Court held that where the plaintiff asserted both frivolous and non-frivolous claims within the suit, a defendant may recover fees attributable to the frivolous claims:

> Some claims succeed; other fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis.
> . . . .
> . . . [A] defendant may deserve fees even if not all the plaintiff's claims were frivolous. In this context, ¶ 1988 serves to relieve a defendant of expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary. That remains true when the plaintiff's suit also includes non-frivolous claims. The defendant, of course, is not entitled to any fees arising from these non-frivolous charges. But the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed.
> . . . [A] court may reimburse a defendant for costs under § 1988 even if a plaintiff's suit is not wholly frivolous. Fee-shifting to recompense a defendant (as to recompense a plaintiff) is not all-or-nothing. A defendant need not show that every claim in a complaint is frivolous to qualify for fees.

Id. at 2213-14 (citations omitted). Given the ruling in *Fox*, and for the reasons argued in the Division's Brief, the Board concludes that if some, but not all, claims in an action were brought in bad faith with the intent to harass or embarrass a permittee, fees attributable to those particular claims may be awarded to a permittee.

III. Procedure moving forward.

Once the above-referenced briefing is complete, the Board will rule upon which, if any, of the subject claims were frivolous and therefore meet the objective portion of the Rule B-15 test. If the Board finds any claims were frivolous, the Board will proceed with an analysis of the subjective component of the bad faith inquiry. The Board may at a future juncture, as part of that

analysis, accept briefing regarding the kinds of motives and subjective purposes that will satisfy the "intent to harass and embarrass" requirement. The Board will not presently authorize any discovery activity, and instead defers the issue of discovery until after the Board has made its decision concerning frivolousness.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 2nd day of April, 2015.

UTAH BOARD OF OIL, GAS & MINING

Ruland J Gill, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER for Docket No. 2009-019, Cause No. C/025/0005 to be mailed via E-mail, or First Class Mail, with postage prepaid, this 2nd day of April, 2015, to the following:

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